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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

G&W BUILDERS, INC., Plaintiff and Appellant, v. BERNARDS BROS., INC., et al., Defendants and Appellants.	B226690 (Los Angeles County Super. Ct. No. MC014697)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County. Randolph Rogers, Judge. Affirmed in part and reversed in part with directions.

Law Offices of Ted R. Gropman, Ted R. Gropman; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Defendants and Appellants.

Tomassian, Throckmorton & Inouye, Serge Tomassian, and Robert S. Throckmorton for Plaintiff and Appellant.

Bernards Bros., Inc., a general contractor, and Seaboard Surety, its bonding company, appeal from a judgment awarding damages, statutory penalties, prejudgment interest, costs and attorney fees to Bernards's subcontractor, G&W Builders. G&W cross-appeals claiming that the court should have awarded attorney fees pursuant to the payment bond as well as the prompt payment statutes. We affirm the judgment except as to the cause of action for late progress payments and remand the matter to the trial court for a calculation of the resulting attorney fees and costs and recalculation of G&W's prejudgment interest.

FACTS AND PROCEEDINGS BELOW

A. Bernards's Subcontract With G&W

The City of Lancaster awarded Bernards a construction contract at the Antelope Valley Fairgrounds (the Project). Bernards subcontracted with G&W to design and build three pre-engineered metal buildings for the Project. The original agreed price for the buildings was $1,851,000. With change orders the price increased to $2,024,915.

1. The dispute over wall insulation

G&W's contract with Bernards stated that "[u]nless otherwise indicated . . . the cost of . . . [r]igid roof insulation [and] wall insulation" is excluded. Attachment B to the contract, however, gave Bernards the option to have G&W "furnish and install R-30 roof insulation . . . and R-19 wall insulation at exterior walls for the additional . . . sum of $141,498.00." When Bernards elected to exercise that option, G&W objected on the grounds that its bid did not include wall insulation, it informed Bernards of that fact on several occasions, and that inclusion of wall insulation in the contract resulted from inadvertence on the part of G&W's president in reviewing the document.

After negotiations the parties agreed to a change order that provided G&W would install "wall insulation between the wall girts and metal wall panels only." Later, a dispute arose between the parties as to the meaning of the change order. G&W contended it agreed only to install wall insulation "in the inaccessible parts of the building up high that could be put in between the wall panels and the wall girts."

Bernards contended that G&W agreed to install all wall insulation above the masonry wall. As a result of this dispute, G&W did not install any wall insulation. Instead, Bernards hired another contractor to install the wall insulation and back charged G&W for the cost.

2. The dispute over withheld progress and retention payments

A dispute also arose between G&W and Bernards over Bernards's failure to make timely progress and retention payments to G&W. Commencing in November 2002, Bernards withheld a total of $239,053 in payments on the ground that G&W did not complete its work on schedule. The court found that Bernards properly withheld only a portion of this fund in a bona fide dispute with G&W and that Bernards owed G&W the improperly withheld amount, the 2 percent statutory penalty and the statutorily mandated attorney fees as the "prevailing party" on the claims.

B. G&W's Subcontract With Pre-Fab Erectors

G&W subcontracted with Pre-Fab Erectors, a licensed structural steel contractor, to erect a metal building "includ[ing] roofing and siding and flashings." Bernards refused to pay G&W for Pre-Fab's work on the ground that Pre-Fab's contractor's license did not cover all the different kinds of work that it performed. The court found G&W was entitled to reimbursement for the money it paid to Pre-Fab.

C. Dispute Over G&W's Timely Completion Of Work

Claiming that G&W failed to complete its work on time, Bernards withheld payment on G&W's invoices for November 2002 and January and February 2003. Bernards also informed G&W it intended to back charge G&W for costs it incurred resulting from G&W's delays in completing its work, including hiring another contractor to install the exterior wall insulation in the buildings. The total amount of Bernards's back charges left G&W with a negative balance on its contact of approximately $70,000. In April 2003, G&W filed a stop payment notice with the City for $239,000, the amount it contended it was owed by Bernards. The following day Bernards posted a bond for release of the stop notice.

The parties continued their dispute over G&W's timely completion of its work and Bernards's timely payment of G&W's invoices. G&W informed Bernards that it had completed all the items it considered to be within its scope of work and would not do any additional work. Bernards responded by notifying G&W that it was in breach of its contract, the contract was terminated and that G&W was not to return to the site of the Project for any reason. Bernards hired another subcontractor to complete the work it deemed left unfinished by G&W.

The City accepted the project as complete in July 2003.

The court found that Bernards had wrongfully withheld a portion of the money otherwise due to G&W.

D. G&W's Suit Against Bernards And Seaboard

In April 2003, G&W filed a complaint against Bernards and Seaboard which, as later amended, alleged causes of action for breach of contract, negligent misrepresentation and for recovery on the payment bond and the stop notice bond. The complaint also named as a defendant United States Fidelity and Guarantee Company (USF&G), which issued a bond on the stop notice filed by G&W. All three defendants answered and Bernards cross-complained against G&W for breach of contract.

The cause was tried to the court, which awarded G&W $357,714.39 in damages plus prejudgment interest, costs and attorney fees under California's "prompt payment" statutes in the sum of $429,901.50. The court ordered that Bernards take nothing on its cross-complaint. Bernards, Seaboard and USF&G filed a timely appeal.[1] G&W filed a cross-appeal claiming its entitlement to attorney fees arose under Bernards's surety bond as well as the "prompt payment" statutes.

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[1] We granted Bernards's request to treat its notice of appeal to include Seaboard and USF&G. USF&G did not file a brief.

DISCUSSION

I. THE COURT PROPERLY CONSIDERED PAROL EVIDENCE THAT A TERM OF THE AGREEMENT BETWEEN G&W AND BERNARDS WAS OBTAINED BY FRAUD

The trial court ruled that G&W was not obligated to install wall insulation because Bernards committed "constructive fraud" when it inserted a wall insulation provision in the contract. Bernards knew that wall insulation was not included in its solicitation of bids for the Project and knew that G&W's bid did not include wall insulation. Given that knowledge, Bernards acted fraudulently in submitting a contract to G&W for signature that would have required G&W to provide wall insulation at Bernards's option "without clearly calling G&W[']s] attention to the change as a proposed modification."

We need not decide whether the evidence establishes constructive fraud on the part of Bernards because Bernards does not challenge the court's finding that it does. Instead, Bernards argues that the court was able to reach that finding only by violating the parol evidence rule and admitting evidence that G&W concedes contradicts the wall insulation provision of the contract—an unambiguous term in a contract that was intended by the parties to be a final expression of their agreement. (Code Civ. Proc., § 1856, subd. (a).)

Bernards's argument fails because the parol evidence rule "does not exclude . . . evidence . . . to establish illegality or fraud." (Code Civ. Proc., § 1856, subd. (g).) Since Bernards does not deny that the parol evidence establishes fraud, the evidence was admissible.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT PRE-FAB'S WORK WAS WITHIN ITS LICENSE OR "INCIDENTAL AND SUPPLEMENTAL" TO THE LICENSED WORK

G&W subcontracted with Pre-Fab, a licensed structural steel contractor, to erect a metal building at the Project "includ[ing] roofing and siding and flashings." The evidence at trial showed that Pre-Fab installed the building's columns, girts**,** roof rafters, purlins, insulation and some of the flashings. Bernards maintains that Pre-Fab was

prohibited from performing work that involved trades for which it was not licensed such as installing insulation and G&W cannot be compensated for that work. Bernards further contends that because Pre-Fab performed work outside its license, G&W is barred from recovering compensation for any work done by Pre-Fab. We reject Bernards's first contention so we do not reach its second.

California contractors are licensed in three categories: A—general engineering contractors, B—general building contractors and C—specialty contractors such as insulation and acoustical contractors (C2), roofing contractors (C39), sheet metal contractors (C43) and structural steel contractors (C51). (Bus. & Prof. Code, §§ 7056-7058[2]; Cal. Code Regs., tit. 16, § 830 et seq.) As a general rule, a specialty contractor is prohibited from performing work that involves trades for which it is not licensed. (§ 7059, subd. (a); Cal. Code Regs., tit. 16, § 830, subd. (b).) An exception to this rule allows a specialty contractor to perform work that "is incidental and supplemental to the performance of the work in the craft for which the specialty contractor is licensed." (§ 7059, subd. (a).)

No contractor may bring an action to collect compensation for the performance of work that required a license without proving that he or she was a duly licensed contractor at all times during performance of the work. (§ 7031, subd. (a).)[3] This rule bars a licensed contractor from obtaining compensation for work performed on its behalf by an

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[2] All subsequent statutory references are to the Business and Professions Code unless otherwise stated.

[3] Section 7031, subdivision (a) states in relevant part: "[N]o person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person[.]"

unlicensed contractor. (See *Weeks v. Merritt Bldg. & Constr. Co.* (1974) 39 Cal.App.3d 520, 523-524.)

Substantial evidence supports the trial court's implied finding that when Pre-Fab erected the building at the Project, Pre-Fab's work was within the scope of its license as a structural steel contractor.

California Administrative Code, title 16, section 832.51, defines a structural steel contractor as one who "fabricates and erects structural steel shapes and plates, of any profile, perimeter or cross-section, that are or may be used as structural members for buildings and structures, including the riveting, welding, rigging, and metal roof systems necessary to perform this work."

Pre-Fab did not do unlicensed work because, under its license to fabricate and erect structural steel shapes, Pre-Fab was permitted to erect the prefabricated building at the Project as well as to fabricate and install steel shapes used as structural members for the building including columns, girts, roof rafters, purlins and flashings. Roofing insulation falls within the construction of "metal roofing systems" permitted under Pre-Fab's license or at the very least "is incidental and supplemental to the performance of the work in the craft for which [Pre-Fab] is licensed." (§ 7059, subd. (a).)

III. G&W IS NOT ENTITLED TO THE STATUTORY PENALTIES FOR BERNARDS'S LATE PROGRESS PAYMENTS BUT IS ENTITLED TO PENALTIES FOR THE LATE RETENTION PAYMENTS

California's "prompt payment" statutes require that a prime contractor pay its subcontractors for the subcontractors' work no later than 10 days after the prime receives a progress payment and not less than seven days after it receives all or any portion of a retention payment. If a prime fails to make a timely payment to a sub then, in addition to the amount of the progress or retention payment due the sub, the prime must also pay the sub a statutory penalty of 2 percent of the amount due per month for every month that payment is not made. In the case of a "bona fide" dispute over all or any portion of the payment due from the prime to the sub the prime may withhold up to 150 percent of the disputed amount without penalty until the dispute is settled. (§ 7108.5, subds. (b) & (c);

Pub. Contract Code, §§ 10262.5, subd. (a), 7107, subds. (b), (d), (e) & (f).) In any action to collect progress or retention payments wrongfully withheld, the prevailing party is entitled to attorney fees. (§ 7108.5, subd. (e); Pub. Contract Code, §§ 7107, subd. (f), 10262.5, subd. (a).)

Here, the court found that Bernards was late in paying G&W its share of the progress and retention payments that Bernards received from the City. It further found that only a portion of these sums were the subject of a bona fide dispute between the parties and therefore Bernards was entitled to withhold 150 percent of that amount without penalty pending resolution of the dispute. Accordingly, the court found that G&W was entitled to payment of the amount not subject to a bona fide dispute plus a 2 percent penalty on that amount and attorney fees.

Bernards contends that the court erred in awarding G&W these late payment penalties. We conclude that G&W was not entitled to late payment penalties on the progress payments but was entitled to penalties on the retention payments.

A. The Penalties For Late Progress Payments Are Barred By The One-Year Statute Of Limitations

Viewing the evidence in the light most favorable to the judgment (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 693-694), Bernards received its final progress payment on February 15, 2003. The limitations period for "[a]n action upon a statute for a penalty" is one year. (Code Civ. Proc., § 340, subd. (a).) G&W's first amended complaint, which added a claim for progress penalties, was not filed until September 9, 2004—beyond the one-year statute of limitations.[4]

G&W contends that its claim for progress payment penalties relates back to its original complaint filed on April 30, 2003, within the one-year limitations period. We disagree.

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[4] Bernards does not contend that the retention payment penalties are barred by the statute of limitations.

For the relation-back doctrine to apply "the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409, italics omitted.)

G&W's original complaint alleged a cause of action for breach of contract based on Bernards's failure to pay G&W the sum the parties agreed to in their contract. In the first amended complaint G&W added a new paragraph to the breach of contract cause of action, alleging that Bernards received progress and retention payments from the City and that Bernards "improperly withheld payment to [G&W] and [G&W] is entitled to damages on the unpaid payments in the sum of 2 percent per month, plus prejudgment interest, plus attorneys fees and costs, according to proof." The first amended complaint also added a prayer for damages "on the unpaid payments in the sum of 2 percent per month from the date due."

The claims for progress and retention payment penalties in the first amended complaint do not relate back to the original complaint because they do not "rest on the same general set of facts" pled in the original complaint nor do they "involve the same injury." (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 409, italics omitted.) The original complaint did not allege any facts relating to progress or retention payments nor did it seek late payment penalties.[5]

B. The Court Properly Awarded G&W Late Payment Penalties On The Retention Payments

Section 7107, subdivision (d) of the Public Contract Code requires the prime contractor to pay its subcontractors their respective shares of the retention proceeds within seven days after receiving the proceeds from the public entity. If the prime fails to pay the retention on time, the sub may recover a penalty in the amount of "2 percent

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[5] Our reversal of the judgment awarding penalties for late progress payments under section 7108.5 means that G&W is no longer the "prevailing party" on that claim. (§ 7108.5, subd. (c).)

per month on the improperly withheld amount, in lieu of any interest otherwise due." (Pub. Contract Code, § 7107, subd. (f).) The prime's obligation to pay its subs within seven days is, however, expressly subject to a good faith exception. Subdivision (e) of the statute provides: "The original contractor may withhold from a subcontractor its portion of the retention proceeds if a bona fide dispute exists between the subcontractor and the original contractor. The amount withheld from the retention payment shall not exceed 150 percent of the estimated value of the disputed amount."

Bernards argues that the court miscalculated the amount of its bona fide withholdings from the retention payments, and if the court had correctly calculated the amount it was entitled to withhold, it would have owed G&W nothing in late retention payment penalties. We do not agree that the court miscalculated the amount of the bona fide withholdings.

The court calculated the late payment penalty on the retention payments as follows. Bernards kept $202,491 in retention payments that would otherwise have gone to G&W. Of that amount, Bernards claimed $103,798 in a bona fide dispute with G&W over the timely completion of its work. Bernards was allowed to withhold 150 percent of that disputed $103,798, which is $155,697. The amount Bernards retained ($202,491) minus the amount of its bona fide withholding ($155,697) equals $46,794. The court found the latter amount should have been paid to G&W and was therefore subject to the 2 percent penalty.

Bernards maintains that the court should have included in the amount of its bona fide withholding the $97,331 that G&W claimed Bernards owed it "for additional work caused by [Bernards]." This would have added $145,996 (150 percent of $97,331) to Bernards's already established bona fide withholding of $155,697 (see previous paragraph) for a total bona fide withholding of $301,693. Since the amount of Bernards's bona fide withholding ($301,693) would exceed the amount of the retention payment otherwise owed to G&W ($202,491 (see previous paragraph)), Bernards would not be liable for the late payment penalty.

The problem with Bernards's argument is that the court did not find that a bona fide dispute existed between the parties over G&W's extra work claims. As the appellant, Bernards bears the burden of showing us why the court's failure to make that finding is reversible error. It has not done so.[6]

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE JUDGMENT ON SEABOARD'S PAYMENT BOND

Seaboard argues that there was insufficient evidence to support a judgment for G&W on its payment bond claim. We disagree.

According to Seaboard, in order for G&W to prove its claim against the payment bond that Seaboard allegedly issued to Bernards, G&W had to prove that Seaboard is an admitted surety insurer, that it issued a payment bond on Bernards's behalf, that the bond was filed with and approved by the City of Lancaster, and that G&W prepared a written notice on the claim. Seaboard cites former Civil Code section 3248[7] and *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.* (2009) 170 Cal.App.4th 554, in support of these requirements. Neither citation is on point.

Civil Code section 3248 lists the requirements a bond must satisfy in order to be approved by a public entity. None of the requirements put forward by Seaboard appears in the statute.

Oldcastle Precast involved an appeal by an insurer from a summary judgment in favor of the plaintiff in a suit on a payment bond. The court summarized the evidence that the plaintiff submitted in support of its motion, including a written notice of a

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[6] Bernards also argues that if the amount G&W paid to Pre-Fab is subtracted from the amount Bernards owed G&W on the subcontract, Bernards's bona fide withholding would exceed the amount owed to G&W and Bernards would owe nothing in late payment penalties. This argument fails because, as we held in Part II, *ante*, Bernards was obligated to reimburse G&W for what it paid Pre-Fab to construct one of the steel buildings.

[7] Civil Code section 3248 was repealed effective July 1, 2012 and replaced by section 9554, which contains similar provisions. (Stats. 2010, ch. 697, § 16.)

bond claim (*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co.*, *supra*, 170 Cal.App.4th at p. 564), and found that plaintiff met its initial burden of "producing evidence establishing the elements of its claim for recovery on the payment bond[.]" (*Id*. at p. 565.) The court did not say what those elements were.

Seaboard next argues that G&W "failed to present any evidence to establish Seaboard did in fact provide the City with a payment bond in conformity with Civil Code section 3248." This argument lacks merit. Exhibit 152, which was admitted on stipulation by the parties, is substantial evidence that Seaboard issued the bond in this case as is Seaboard's acknowledgment in its cross-respondent's brief that its bond is the "subject bond in this case[.]"

V. THE COURT ERRED IN NOT BASING DEFENDANTS' LIABILITY FOR ATTORNEY FEES ON THE PAYMENT BOND AND CIVIL CODE SECTION 3250[8]

After the court awarded judgment in favor of G&W against Bernards and Seaboard, G&W brought a motion for an award of attorney fees from both defendants. The court granted the motion as to both defendants and awarded $429,901.50 in fees under section 7108.5, subdivision (e) (progress payments) and Public Contract Code sections 7107, subdivision (f) (retention payments) and 10262.5, subdivision (a) (progress payments). G&W filed a timely appeal from this order contending that the court should have based defendants' liability for attorney fees on Seaboard's payment bond and Civil Code section 3250 as well as on the prompt payment statutes. Defendants did not appeal. We agree with G&W.

Seaboard acknowledges its payment bond in this case provides that it "will pay in case suit is brought upon this bond, . . . reasonable attorney's fees as shall be fixed by the court." As noted above, the court awarded judgment to G&W on its cause of action against Seaboard on its bond. Therefore G&W is entitled to attorney fees from Seaboard.

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[8] Civil Code section 3250 was repealed effective July 1, 2012 and replaced by section 9564, which contains a similar attorney fee provision. (Stats. 2010, ch. 697, § 16.)

Similarly, Civil Code section 3250 provides that in cases brought on payment bonds "the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs."

The court declined to award attorney fees under the authority of the payment bond because "plaintiff's claims against defendants under the prompt payment statutes involved the same core set of facts and interrelated legal issues as in its payment bond claim." In other words, the court saw no reason to use the payment bond as authority for the attorney fees award when, it believed, the prompt payment statutes would do just as well. We do not disagree with the court's conclusion that the payment bond and prompt payment claims arise from essentially the same set of facts and legal issues. But this does not permit the court to decline to award attorney fees pursuant to the mandatory provisions of Civil Code section 3250 and the bond itself.

Seaboard contends the court had discretion to pick which of several mandatory attorney fees provisions to use as the authority for its award. The cases it cites do not support its contention. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084 pertained to the court's discretion in determining the amount of attorney fees not in determining the statute or contract under which the fees should be awarded. *Fed-Mart Corp. v. Pell Enterprises, Inc.* (1980) 111 Cal.App.3d 215 held that the court was not required to apportion attorney fees between different causes of action where it would be impracticable to do so. (*Id*. at p. 227.) The question before us is not whether the court can apportion liability for attorney fees among the parties but whether it can ignore the mandatory attorney fee provisions of a statute and a bond.

DISPOSITION

The award to plaintiff based on late progress payments under Business and Professions Code section 7108.5 and Public Contract Code section 10262.5 is reversed and the cause is remanded to the trial court with directions to modify the judgment to recalculate the prejudgment interest due plaintiff and to award to defendants Bernards and Seaboard attorney fees and costs on that one cause of action. In all other respects the judgment is affirmed. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.